

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

USF LOGISTICS, INC.

and

Case 4-CA-28907

GERALD COSTELLO, An Individual

*Donna D. Brown, Esq.*,  
for the General Counsel.  
*Clifton E. Smith, Esq.*, of Costa Mesa, CA,  
for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on October 3, 2000, in Philadelphia, Pennsylvania, pursuant to a Complaint and Notice of Hearing (the complaint) issued by the Regional Director for Region 4 of the National Labor Relations Board (the Board) on May 24, 2000.<sup>1</sup> The complaint, based upon a charge in Case 4-CA-28907 filed on February 1, by Gerald Costello, alleges that USF Logistics, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent interrogated and threatened employees with reprisals if they selected Teamsters Union Local 107, a/w International Brotherhood of Teamsters, AFL-CIO (the Union) as their collective bargaining representative in violation of Section 8(a)(1) of the Act. Additionally, the complaint alleges that Respondent issued a warning and thereafter discharged employee Gerald Costello, in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

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<sup>1</sup> All dates are in 2000 unless otherwise indicated.

## Findings of Fact

## I. Jurisdiction

5           The Respondent is a corporation engaged in the warehousing and distribution of  
merchandise, with a facility and place of business located in Philadelphia, Pennsylvania, where  
it annually purchases and receives goods valued in excess of \$50,000 directly from points  
outside the Commonwealth of Pennsylvania. The Respondent admits and I find that it is an  
employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and  
10       that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

## A. Background

15           Gerald Costello was employed at Respondent from January 7, 1999 to January 13, and  
normally worked a 12 hour shift on Thursday through Sunday. He was hired despite having  
been convicted of a felony. Costello initially held the position of a switcher until he was  
promoted to the classification of lead switcher in July 1999.<sup>2</sup> Prior to this promotion, incumbent  
20       lead switcher Gerry Moran explained the responsibilities of the position and apprised Costello  
that he would be held to a higher standard than other employees. The Respondent shares a  
location adjacent to large building supplier Home-Depot and transports consumer merchandise  
to numerous Home-Depot retail stores in the northeast portion of the United States.

25           The Union commenced an organizing campaign at Respondent around April 1999.  
Costello was the leading union adherent and distributed union authorization cards to employees  
and then returned them to the Union. During the period between April and July 1999, he spoke  
to a number of supervisors about the Union. For example, in a conversation with Costello in  
July 1999, General Manager Greg Malarney said, "I see you are talking to the Union  
30       representatives." Costello also talked about the pros and cons of the Union with Operational  
Manager Lenny Lacktman, Supervisor Paul Stevens and Human Resources Manager Michelina  
Duarte.

35           The Union filed a petition on June 21, 1999 and an election was held at Respondent on  
August 6, 1999 (G.C. Exh. 2). The tally of ballots issued on August 6, 1999, shows that of  
approximately 116 eligible voters, 103 ballots were cast, 27 in favor of representation by the  
Union, 73 against, and 3 were challenged. On August 17, 1999, the Regional Director for  
Region 4 issued a Certification of Results of Election finding that a majority of the valid ballots  
40       have not been cast for any labor organization and that no labor organization is the exclusive  
representative of the employees in the bargaining unit.

45           In October 1999, Costello's daughter was shot in a drive-by shooting. Costello  
requested time-off from work, and Respondent told him to take as much time as necessary.  
Costello took an initial week in October and a second week in November 1999. On December  
23, 1999 (Thursday), Costello attended his wife's Christmas party that commenced around 11

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<sup>2</sup> The lead switcher or lead yard jockey directs other switchers and coordinates projects in the yard. The incumbent of the position spends a great deal of time on the radio directing large trailers while backing into the approximately 120 loading dock doors at the facility. The lead switcher is also in charge of security and has overall responsibility in directing the workflow in the yard.

a.m. During the course of the party, which lasted until around 3 p.m., Costello consumed three beers. He also was the winner of the door prize that provided two tickets for the Philadelphia Flyer hockey game that evening. After the party, Costello went to the facility in order to pick up his paycheck that was regularly distributed after 3 p.m. Upon arriving at work, still wearing a coat and tie, Costello sought out Lacktman and informed him that he had a few beers at his wife's Christmas Party. Accordingly, he gave Lacktman notice that he would not be reporting for work that evening for his regularly scheduled 6 p.m. shift. Lacktman thought Costello was joking but Costello repeated that he would not be reporting for work and he intended to use the hockey tickets he had won at the party later that evening. Since the Christmas season was a busy time, Lacktman immediately went upstairs and sought out Night Shift Manager Glen Giglio. He apprised Giglio that Costello was not coming to work for his scheduled evening shift due to his drinking at his wife's Christmas party earlier in the day and winning two hockey tickets for the Flyer's game later that evening. Giglio attempted to get coverage for Costello's position and ultimately was able to get Shannon Lewis to cover the position. Lewis had some experience as a lead switcher at a prior employer but had not worked in that position while employed at Respondent.

#### B. The 8(a)(1) Violations

The General Counsel alleges in paragraph 5(a) of the complaint that on or about December 30, 1999, Giglio (i) interrogated an employee concerning the employee's Union sympathies, (ii) threatened the employee with job loss if employees sought Union representation; and (iii) threatened to discharge employees who were active on behalf of the Union.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.*, 987 F.2d 445 (7<sup>th</sup> Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

Costello did not work between December 23 and December 29, 1999. On December 30, 1999, (Thursday), Costello returned to work and was informed that Giglio wanted to see him. Costello proceeded to Duarte's office where Giglio conducted a meeting with Duarte also in attendance. Costello was informed that because he had "called out" on December 23, 1999, that they were thinking of taking away his position of lead switcher. The meeting was called for the purpose of an oral counseling session to conform to the Respondent's Standard of Conduct and Corrective Action Guidelines (G.C. Exh. 10). During the meeting, Costello was apprised that his actions in "calling out" on December 23, 1999, jeopardized the Employer during an exceptionally busy period and as a lead switcher he should have shown more responsibility toward the company. Duarte added that Costello should have known better. According to Costello, Giglio brought up the Union during the meeting and said, "I am not going to let the Union take away work from Home Depot." Additionally, he said "that I'm not going home and telling my wife that I no longer have a job because Home Depot pulled out of here because of a union." "And, I am not going to let that happen over a few guys here." "Half of them are already taking care of themselves and I am going to get the rest of them." The meeting ended after about an hour but the Respondent did not take away Costello's lead switcher position.

Giglio testified and confirmed that he and Duarte met with Costello on December 30, 1999, to give him an opportunity to explain why he did not come to work on December 23, 1999. Both Giglio and Duarte informed Costello that his conduct was unacceptable and as a lead switcher, he was not setting an example for other switchers. Giglio denies that he brought up anything about the Union during the meeting. Rather, he asserts that Costello brought up the

Union and blamed the meeting on the fact that he was active in trying to bring the Union into the Respondent. Giglio then replied, it was not about the Union. Rather, it was his belief that customers would not support the Union.

5 In attempting to resolve this direct credibility dispute between Costello and Giglio, I note the following. First, Giglio did not commence employment with the Respondent until September 13, 1999, a period of approximately one-month after the Union election. Thus, he was not directly aware of Costello's involvement in the campaign and did not take part in any job performance issues impacting Costello between September 13 and the date of the meeting. 10 Second, contrary to Costello's assertion, Giglio credibly testified that he is not married. Thus, I am suspect of Costello's testimony that Giglio referred to his wife when he said that he did not want to tell her that he no longer had a job because Home Depot pulled out due to a union. Third, Costello admitted on cross-examination that Giglio never told him he could lose his job because of the Union.

15 Based on the forgoing, and particularly noting the calm demeanor of Giglio and his forthright testimony, I do not believe that he made the statements attributed to him in paragraph 5(a) of the complaint. In this regard, even accepting Costello's testimony in the best light, it does not support the complaint allegations. Indeed, Costello admitted that Giglio never 20 threatened him that he would lose his job because of the Union. Additionally, since Giglio is not married, I do not believe that he made the statement that Home Depot would pull out because of a union, as testified to by Costello. Thus, based on the totality of the testimony, I am not convinced that Giglio threatened Costello in any manner on December 30, 1999. Rather, I find that December 30, 1999, was the first opportunity that Giglio and Duarte had to counsel Costello 25 about his inappropriate judgement in "calling out" on December 23, 1999, and jeopardizing the Employer during the critical Christmas holiday period.

Therefore, I find that Giglio did not make the statements attributed to him in paragraph 5(a) of the complaint and recommend that those allegations of Section 8(a)(1) of the Act be 30 dismissed.

The General Counsel alleges in paragraph 5(b) of the Complaint that on or about December 31, 1999, Giglio threatened an employee with job loss if employees sought Union representation.

35 To support this allegation, the General Counsel presented the testimony of lead switcher Gerry Moran. He testified that when he heard that Costello's lead switcher position might be in jeopardy, he initiated a meeting with Giglio and Duarte. During the course of the meeting, the topic of the Union came up and Giglio said, "I do not want to go home to my wife and kids and 40 tell them I would lose my job over the Union."

Giglio testified that such a meeting never took place and therefore, he could not have made the statement attributed to him.

45 In deciding this allegation, I note as I did earlier that Giglio is not married. Thus, I am suspect that he would have made such a statement and referred to his wife. Second, it does not seem logical that Giglio would have agreed to a meeting with a lead switcher to discuss potential discipline for another employee. Moran is not a part of management and would have no input in the discipline of another employee. Indeed, Moran admitted that neither Giglio nor Duarte ever shared such confidential information with him at other times before or after the alleged meeting. Third, Moran was uncertain about the date the meeting was held until prompted by the General Counsel. Fourth, Moran admitted that no member of supervision ever

threatened him with the loss of his job if he supported the Union. Lastly, I find that even if Giglio made the statement, he was not referring to employees but rather to himself. Thus, such a statement is not violative of the Act.

- 5           Based on the forgoing, and particularly noting that Moran did not confirm the allegations in paragraph 5(b) of the complaint, I recommend that they be dismissed.

### C. The 8(a)(1) and (3) Violations

- 10           The General Counsel alleges in paragraph 6(a) of the complaint that on or about January 7, Respondent issued a warning to Costello.

- 15           On January 7, Costello was called to a meeting in Duarte's office and was given an Employee Corrective Action Counseling Reminder that he signed (G.C. Exh. 3). The Counseling Reminder summarized that Costello's conduct on December 23, 1999, was irresponsible and inappropriate behavior for a lead switcher. It specifically referenced that he came into work around 21/2 hours before his scheduled start time and informed Lacktman that he would not be in that night because he had a few drinks at his wife's Christmas party and won the door prize for two hockey tickets that evening. The Counseling Reminder informed Costello that any further infractions could result in his lead switcher position being taken away or possible termination.

- 25           In *Wright Line*, 251 NLRB 1083 (1980), enfd, 662 F. 2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

- 40           For the following reasons, I find that the General Counsel has made a showing that the Respondent was motivated by antiunion consideration in issuing the written warning. First, the evidence establishes that Costello was the leading union adherent in attempting to organize Respondent's employees. Second, General Manager Malarney observed Costello talking to the Union organizers during the period of the election campaign.

- 45           The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

For the following reasons, I find that the Respondent would have issued the written warning to Costello even in the absence of his protected conduct. First, I find that Costello was aware that the position of lead switcher was critical to Respondent's business operation and that he would be held to a higher standard of responsibility. Second, Costello admitted that he knew about his wife's Christmas party at least two weeks in advance of December 23, 1999, yet he did not apprise anyone at Respondent more than two hours in advance of his regularly scheduled shift that he would not be working that evening. Indeed, the Christmas season is one

of the two busiest periods when extra trailers must be prepared for the distribution of Home Depot merchandise to retail stores for customer purchase. When Costello "called out" with such short notice, it left the Respondent in a precarious position since they were short staffed because of the holidays. Third, during the counseling session held on December 30, 1999, Costello did not express any remorse concerning his use of poor judgement when he appeared at the facility while inebriated and did not report to work as scheduled.

For all of the above reasons, I conclude that the Respondent did not issue the written warning to Costello because of his union activities, and recommend that paragraph 6(a) of the complaint be dismissed.

The General Counsel alleges in paragraph 6(b) of the complaint that on or about January 13, Respondent discharged Costello.

On January 6, Costello and co-worker Tom Gildersleeve had a verbal confrontation over the amount of work each was performing and how long it took for Gildersleeve to complete work assignments. The disagreement began to escalate as both employees approached the main office, and they sought an Operations Manager to intervene. In the presence of Supervisor Stevens, Costello and Gildersleeve continued their verbal disagreement and as they were following Stevens to the supervisor's office, Costello attempted to climb over Steven's back to get to Gildersleeve. Stevens immediately pulled Costello to the side and attempted to separate the two employees. About that time Supervisor Greg McIntyre, who was finishing a telephone call with Operations Manager John Monteleone, joined the group. Costello said, "I should have cocked him." All of the individuals proceeded into the supervisor's office and Stevens and McIntyre attempted to diffuse the argument. The two employees continued to bicker and exchange profanity. While the group was still in the office, Monteleone telephoned the facility and Gildersleeve left the office to speak with him. After the telephone call, Gildersleeve with permission, went home for the evening. While still in the supervisor's office, Stevens told Costello that he was dead wrong and what he did could be automatic grounds for termination. Stevens also told Costello that as a lead switcher he acted very unprofessional; his job is to try and calm situations when they get out of hand and instead he inflamed it. After this discussion, Costello returned to work.

Stevens did not work the next three days and on Monday, January 10, he reported the incident to Giglio. He also memorialized what took place on January 6 (R. Exh. 3). On January 7, Giglio spoke to a number of supervisors about the incident. On January 9, Giglio spoke to Gildersleeve about the confrontation and it was decided to issue a verbal Counseling Reminder that Gildersleeve signed on January 14 (G.C. Exh. 11). On January 10, Giglio spoke with Stevens and McIntyre who both reported that Costello was the aggressor in the incident.

On January 13, Giglio summoned Costello to his office and apprised him that his participation in the incident that occurred on January 6, was inappropriate behavior. He informed Costello that this was the second incident that happened in a two-week period and as a lead switcher it was unacceptable conduct. Under these circumstances, Giglio told Costello that he was being terminated.<sup>3</sup>

<sup>3</sup> Respondent introduced the employee termination form in evidence (R. Exh. 4). The form cites Standard of Conduct 5.4-Procedure C in support of the discharge. It states, "In those circumstances in which the misconduct or performance is so serious that, in the opinion of the Company, it raises doubts regarding the suitability of the individual for continued employment, any or all corrective action steps may be waived. Examples of these instances are, reporting to

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Contrary to the General Counsel, I am not convinced that Costello was terminated because of his activities on behalf of the Union. Indeed, consistent with *Wright Line*, I find that the Respondent would have terminated Costello even in the absence of his protected conduct. In this regard, I note that during the midst of the Union organizing campaign and with knowledge of Costello's protected conduct, the Respondent promoted him to the position of lead switcher. Additionally, after the election and when Costello's daughter was shot, the Respondent bent over backward to accommodate him and granted him a week off from work in October and a second week in November 1999, to be with his child. Lastly, it seems incongruous that five months after the election, in which the Union was soundly defeated, the Respondent would now reach out to terminate Costello because of his activities on behalf of the Union. Rather, I conclude that Costello was terminated because of the back to back infractions that occurred in a two-week period. Indeed, the penalty of termination is firmly supported in the Respondent's Standards of Conduct and Corrective Action Guidelines.

For all of the above reasons, I do not find that the Respondent violated Section 8(a)(1) and (3) of the Act when it terminated Costello on January 13, and I recommend that paragraph 6(b) of the complaint be dismissed.

#### D. Disparate Treatment

The General Counsel argues that the Respondent treated other employees less harshly when it came to imposing discipline in comparison to Costello.

In this regard, the General Counsel contends that employee Ed Smith came into work five hours late on December 23, 1999, but was not issued any discipline. Likewise, it argues that an employee chased a supervisor with a radio but no action was taken. In both of these matters, the General Counsel did not present any concrete evidence to support its contentions. Rather, Costello and Moran testified that they heard about these incidents but grudgingly admitted that they were not present when either incident took place and only heard about what had happened. Under these circumstances, the General Counsel has not convincingly established disparate treatment. Moreover, the documentation introduced by the General Counsel that depicts discipline and terminations visited upon other employees' (G. C. Exh. 4 and 5) is not convincing. In this regard, the infractions are not identical to what Costello was charged with and the majority of the employees are not similarly situated to Costello. It is noted, however, that the Respondent did terminate three employees for assaulting or attempting to assault another employee (G. C. Exh. 5(b), 5(v) and 5(cc)).

In regard to Gildersleeve, who was involved in the January 6 verbal confrontation with Costello, Giglio credibly testified that this was his first infraction and while he was not free from blame, he was not the aggressor in the dispute. Accordingly, Gildersleeve received a verbal counseling reminder (G.C. Exh. 11). It should be noted that Costello was terminated not just for his participation in the January 6 confrontation, but also because of his inappropriate behavior and bad judgement surrounding the December 23, 1999 incident.

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work under the influence of alcohol or drugs and fighting on Company property at anytime" (G.C. Exh. 10).

## Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent did not engage in independent violations of Section 8(a)(1) of the Act by interrogating or threatening employees with reprisals.

3. The Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act by issuing a written warning or terminating employee Gerald Costello because of his protected conduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

## ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 1, 2001.

Bruce D. Rosenstein  
Administrative Law Judge

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.